TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 191.

CLARENCE A. BRANDENBURG, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 26, 1906.

(20,067.)

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1 In the Court of Appeals of the District of Columbia.

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Supreme Court of the District of Columbia.

No. 42961. At Law.

CLARENCE A. BRANDENBURG, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

Amended Petition.

Filed June 3, 1904.

In the Supreme Court of the District of Columbia.

In Certiorari. At Law. No. 42961.

CLARENCE A. BRANDENBURG, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Respondent.

To the justice of the supreme court of the District of Columbia, holding a special term at law:

The amended petition of Clarence A. Brandenburg with leave of court first had and obtained, respectfully showeth:

I. That he is the owner in fee simple and possessed of sub-lots 42 and 43, by the full depth thereof in square numbered 69 in the city of Washington, District of Columbia, as shown on the ground plan of said city, the same abutting 20.43 and 20 feet respectively on an alley running east and west in said square and running back, the same width, to the depth of 75 feet.

2 II. That by an act of Congress approved July 22, 1892, the Congress of the United States undertook to authorize the Commissioners of the District of Columbia to condemn, open, widen, or straighten alleys, in the District of Columbia upon com-

pliance with the terms and conditions of said act, and to authorize the collector of taxes of said District to levy a tax upon each lot or part of lot benefited by the opening, widening, extending, etc., of such alley.

III. In and by an act of Congress approved August 24, 1894, said act of Congress approved July 22, 1892, was amended so far as to "authorize the Commissioners of the District of Columbia, under the terms and conditions of said act, * * * to open minor streets in said District of a width of not less than forty feet, nor more than sixty feet, to run thro ıgh a square from one street to another, whenever in the judgment of said Commissioners the public interest require it."

IV. That thereafter, to wit, in the month of February, 1898, pursuant to an application in writing of the Commissioners of the District of Columbia, and purporting to be made pursuant to the authority attempted to be conveyed by the act of Congress aforesaid, the marshal of the District of Columbia, summoned a jury of twelve persons, "to ascertain the damages which may (might) accrue to any individual or individuals" by the opening of a street in said square 69, to be known as Newport place, by the widening of the 30 foot alley running east and west in said square to a width of 60 feet and the extension of the same by the latter width through said square from 21st to 22nd streets which said streets bounded said square on the east and west sides thereof respectively.

V. That such proceedings were thereafter had, that said jury so impanelled, presided over by the marshal's deputy, and not under the supervision of any judicial tribunal, thereafter, to wit, on the 17th day of March 1898 made its award and finding, whereby they undertook to condemn for the purposes of said street a part of said sub-lots 42 and 43, that is to say, 40 feet 3 inches, the width thereof, fronting upon said purposed street, by a depth of 15 feet, or one-fifth of the total area thereof, and the respondent, pursuant thereto, has taken actual possession and control thereof for the purposes of said street.

VI. That in said proceedings the jury undertook to allow as the value of the land so taken, $92 for said part of sub-lot 42 and $75. for said part of sublot 43; that said amounts were never paid nor tendered to be paid but the respondent has sought to deduct the amounts thereof from the total amounts of the tax apportioned against the portions of said sub-lots remaining.

VII. That in said proceedings said jury apportioned an amount equal to the amount of damages awarded for the land condemned including the expenses of the proceeding, among the several lots in said square, of which amount they charged against the remainder of said lot 42 the sum of $650, less the sum of $82, the value
3 of the portion taken, and against the remainder of said lot 42 the sum of $550 less the sum of $75. the value allowed for the portion thereof taken.

VIII. That no right of revision or review — said finding of said jury existed, and thereafter, the respondent attempted to levy as a tax or charge against said sub-lots, under the provisions of the acts

of Congress heretofore mentioned, the amounts so fixed by the said jury, that is to say, the sum of $650 less $92 against said sub lot 42 and $550 less $75 against said sublot 43, which said sums are carried on the books of the respondent as taxes against said lots, and because of the non-payment thereof, the respondent threatens a sale thereof.

IX. Your petitioner avers that said charges or taxes and each of them are void and illegal, that said Commissioners were not authorized by said acts of Congress or either of them, or by any other law or part of law, to open a minor street in said square, or to levy a tax or charge in the manner, in which said "minor street" was opened and said taxes or charges were levied.

X. Your petitioner respectfully charges that the acts of Congress under which the proceedings aforesaid were had and pursuant to which the respondent undertook to levy the taxes aforesaid against the lots aforesaid, were and are unconstitutional and void, because they provide for the taking of private property for public uses without making just compensation and without due process of law, in this: 1. That they do not provide for the giving of notice of the proposed taking; 2. In that they provide for the apportionment of the total amount of the damages awarded for the land condemned together with the expenses of the proceedings, among the lots in the square through which the proposed street or alley is to be opened, without regard to the actual benefits; 3. In that they limit the area of assessment to such particular square, without regard to the benefit to adjacent squares, and without regard to the fact that the actual benefits to the square improved may not equal the total cost of improvement; 4. Because they arbitrarily require the assessment of such total cost to the particular square improved, without a legislative determination of the actual benefits or the area benefited, such determination being impossible because said laws are general in nature and were passed without a legislative consideration of the particular improvement, the same not being in contemplation at the time, but arising subsequently.

XI. Your petitioner further avers that the records in custody of the respondent show numerous irregularities and illegalities in the supposed levy of said charges, among which are the following:

(*a.*) That said Commissioners did not, nor did any one else, open or authorize the opening of any minor street in said square, but that they widened and extended a thirty foot alley theretofore existing in said square, without any authority whatsoever so to do but levied said taxes for the opening of a minor street.

(*b.*) That no plat of any minor street to be opened ac-
4 companied by a petition of the owners of more than one-half of the real estate in the square aforesaid was presented to the Commissioners. That the petition presented related to widening an alley and not to opening a minor street and was signed by thirty-six persons who did not own more than half of the real estate in said square and by a trustee who was not authorized by his beneficiaries to sign and who had no power to sign said petition. That the total number of square feet in said square was, to wit: 210,266.80, and

the petition presented to the Commissioners of the District as aforesaid was not the petition of the owners of more than one-half of the real estate in said square.

(*c.*) That it does not appear that the Commissioners of the District of Columbia certified that the preservation of peace, good order and public morals, required that any such alley or minor street should be opened, extended, widened or straightened.

(*d.*) That it does not appear that the health officer of said District certified that such opening, widening or extending was necessary for the public health.

(*e.*) That the value of the land taken or fixed by said jury was twenty-five cents per square foot, while the amount of assessments apportioned against the same was twice as much, to wit, fifty cents per square foot; and petitioner expressly charges that said assessment is more than fifty per cent. in excess of the actual benefits and in itself, was at the time of the levy thereof, and still is in itself in excess of the value of the land in said lots.

(*f.*) That there was not in fact any ascertainment by said jury of actual benefits; on the contrary, there was only an apportionment of the damages awarded in said proceedings and the costs thereof, among the lots in said square.

XII. Petitioner further says that after the proceedings hereinbefore mentioned were had, there were certain further sums, aggregating a large amount, assessed against said lots, of ground under the guise of street improvements, curbing and water main all of which taxes were illegally assessed against said property as street improvements under the laws conferring authority to levy taxes for the improvement of streets, whereas your petitioner avers that legally there never was and is not such a street as Newport place, the proceedings under which an attempt was made to create the same being null and void for the reasons hereinbefore set forth.

XIII. Your petitioner avers that he did not request said work to be done, but repeatedly protested against the same, that he did not sign any petition presented to the Commissioners, that said opening of said minor street, if any such there be, does not in any wise benefit him or his land; that said charges are unpaid, and the respondent now threatens to sell and to convey your petitioner's said parcels of land in order to satisfy said unlawful charges, whereby the title of your petitioner is clouded and he is injured and has no appeal.

5 Wherefore he prays:

First. That a United States writ of certiorari may issue from this court commanding the District of Columbia to certify immediately to this court a copy of each and every record and part of record in its custody relating in any manner to charges and taxes made against any part of sub-lot 42 and sub-lot 43, in square 69, city of Washington, District of Columbia, and purporting to be charges or taxes levied under the authority of acts of Congress approved July 22, 1892 and August 24, 1894 or either of them, together with a full and true copy of any petition by owners of property in said square, made to said Commissioners, and a full

copy of every assessment charge or tax made or purporting to be made for either benefits or damages to any owner or owners of property in said square, together with a copy of all advertisements, measurements, computations, surveys, assessments, notices of assessment to proprietors and returns of manner of service of any such notice: also true copies of all records relating to any special improvement, taxes assessed against said lots since the opening of said Newport place.

Second. That upon the coming in of said returns, the said alleged assessments or charges may be quashed and annulled by the judgment of this court.

CLARENCE A. BRANDENBURG.

BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof, that the matters and things therein set forth of my own knowledge are true, and those set forth upon information and belief, I believe to be true.

CLARENCE A. BRANDENBURG.

Subscribed and sworn to before me this 16th. day of May, A. D. 1904.

H. J. SWEENEY,
[SEAL.] *Notary Public, D. C.*

Endorsed.

June 3, 1904.—Leave granted to file amended declaration and the clerk is directed to let the writ issue as prayed.

JOB BARNARD, *Justice.*

6 *Return of Respondent.*

Filed September 8, 1904.

In the Supreme Court of the District of Columbia.

In Certiorari. At Law. No. 42961.

CLARENCE A. BRANDENBURG, Petitioner,
v.
THE DISTRICT OF COLUMBIA, Respondent.

And now comes the respondent, The District of Columbia, and for return to the writ of certiorari issued in the above entitled cause, *and* certifies to the court true and accurate copies of notice of special assessment against sublots 42 and 43, in square 69, in the District

of Columbia, in the matter of the opening "Newport place," in said square, together with true and accurate copies of the return of service *to* said notice of assessment.

Your respondent prays that its return in the case of Allison Nailor, Jr., *vs.* The District of Columbia, at law, No. 42,837, and its return in the case of Elizabeth McClellan *vs.* The District of Columbia, at law, No. 43,944, may be referred to at the hearing of this cause, and taken as part of its return to the writ of certiorari issued herein.

And on the return hereby made, the respondent prays that the said writ of certiorari issued herein may be quashed and the petition filed herein dismissed.

THE DISTRICT OF COLUMBIA,
By F. H. STEPHENS, *Its Attorney.*

Petition of Property Owners.

Filed July 19, 1900.

WASHINGTON, D. C., *December* 23, 1897.

The undersigned owners of real estate in square numbered sixty-nine (69) in the city of Washington, District of Columbia, to-wit:—the lots or parts of lots enumerated after our respective signatures, do hereby severally and jointly petition the Commissioners of the District of Columbia that the alley thirty feet in width running east and west in said square numbered sixty-nine (69), be widened to the width of sixty (60) feet and be extended or opened to the full width of sixty feet, through said square from Twenty-first street west to Twenty-second street west, as shown and marked in red lines upon the plat of said square herewith submitted and marked "Exhibit N," as a minor street to be known as "Newport place" to be done under and by virtue of, and in the manner prescribed by an act of
7 Congress entitled "An act to open, widen and extend alleys in the District of Columbia" approved July 22, 1892, and an act entitled "An act to open, widen and extend alleys in the District of Columbia, approved August 24th, 1894, the cost thereof, including the benefits less the sum to be deducted for parts of alleys to be closed as shown and indicated upon said plat (by the letters B, C, D, E, F, respectively, thereby rendered useless and unnecessary), to be assessed against the property benefitted thereby and abutting thereon: And further, that in the widening, extending and opening of said alley, or minor street, as aforesaid, the parts of the original alleys in said square designated upon said plat by the letters B, C, D, E, and F, respectively, thereby rendered useless and unnecessary be closed, and the land therein contained be sold and disposed of by the Commissioners of the District of Columbia, in the manner provided for by the first hereinbefore mentioned act, the amount of the proceeds thereof to be applied in the reduction of the

amount to be assessed against the property benefitted, as the cost of the opening of the minor street, as aforesaid.

Very respectfully,

E. B. JONES,
Executrix Est. Mary E. Jones, Dec.
G. B. MOSS,
By G. W. MOSS, *Att'y.*
J. M. JOHNSON, *Trustee.*
W. L. BRAMHALL, *Trustee.*
R. L. BRITTON, *Trustee.*

Certificate of Assessor, D. C.

Filed July 19, 1900.

I hereby certify that the records of the assessor's office of the District of Columbia, show that on December 23, 1897, square numbered sixty-nine (69) in the city of Washington in said District contains 181,047 square feet of land, and that on the above date, the persons whose signatures are appended to the petition asking for the condemnation of land necessary to widen and extend alley in said square, to a width of sixty (60) feet, to be known as "Newport place," appear to be the owners of 121,255 square feet of land in said square.

(S'g'd) MATTHEW TRIMBLE,
Assessor, D. C.

Official copy.
W. TINDALL,
Secretary B'd Com's, D. C.

(Copy.)

Certificate of U. S. Marshal to Commissioners.

Filed July 19, 1900.

To the honorable Board of Commissioners of the District of Columbia:

In the matter of the proposed opening of Newport place by the widening of the thirty foot alley running east and west in
8 square No. 69, to a width of sixty feet, and the extension of the same at the latter width through said square from 21st to 22nd streets, according to the law in such cases made and provided, I caused to be served on the owners of the property affected the following notice in the manner hereinafter designated, to wit:

UNITED STATES MARSHAL'S OFFICE,
WASHINGTON, D. C., *Feb.* 16, 1898.

To —— ——:

The Commissioners of the District of Columbia having made application in writing to me to summon, in pursuance of law, (see acts

of Congress of July 22nd, 1892 and August 24, 1894), a jury of twelve disinterested citizens to ascertain the damages which may accrue to any individual or individuals by the opening of Newport place as above stated, in accordance with the plan and petition therein enclosed, you are hereby notified that the said jury so directed to be summoned as aforesaid will meet to assess the said damages as aforesaid at the south-west corner of 21st and O Sts. northwest, in this city on the 3rd day of March, 1898, at 11 o'clock a. m.

Very respectfully, AULICK PALMER, *Marshal.*

(Copy.)

Order of Commissioners.

Filed July 19, 1900.

OFFICES OF THE COMMISSIONERS
OF THE DISTRICT OF COLUMBIA,
WASHINGTON, *February* 1, 1898.

Ordered: That application is hereby made to the marshal of the District of Columbia to summon and impanel a jury to ascertain and apportion the damages and assess the benefits due to the widening of the thirty-foot alley running east and west in square 69 to a width of sixty feet and the extension of the same at the latter width through said square from 21st to 22nd streets, as per plat enclosed, as a minor street to be known as Newport place, as provided for in the act "to provide for the opening of alleys in the District of Columbia," approved July 22", 1892, and the amendment thereto approved August 24, 1894.

(Signed) JOHN W. ROSS,
(Signed) JOHN B. WIGHT,
(Signed) W. M. BLACK,
Commissioners of the District of Columbia.

9 (Copy.)

Return of Service by Marshal.

Filed July 19, 1900.

Served the foregoing notice on the following named individuals by delivering to each in person a copy thereof February 16th, 1898:
Clarence A. Brandenburg.

* * * * * * *

AULICK PALMER,
United States Marshal, District of Columbia.

(Copy.)

Oath of Jurors.

Filed July 19, 1900.

UNITED STATES OF AMERICA, *District of Columbia:*

We, the undersigned, being a jury of 12, summoned and empanneled by the marshal of the District of Columbia, upon the application of the Commissioners of said District, to ascertain and apportion the damages and assess the benefits due the owners by the widening of the 30 foot alley running east and west in square 69 to a width of 60 feet, and the extension of the same at the latter width through said square from 21st to 22nd streets as a minor street to be known as Newport place, city of Washington, District of Columbia, do solemnly swear on our several oaths that we will faithfully, impartially and without favor and to the best of our judgment ascertain and appraise the damages and benefits which may accrue to each owner of real estate in said square, or to any person or persons by reason of said land or any part thereof being taken by the District of Columbia for the opening of said street according to the plat thereof made by the surveyor of the District of Columbia.

A. D. HAZEN.	[SEAL.]	J. J. HOGAN.	[SEAL.]
HENRY F. BLOUNT.	[SEAL.]	N. H. SHEA.	[SEAL.]
E. SOUTHERD PARKER.	[SEAL.]	C. C. BRYAN.	[SEAL.]
JOHN C. POOR.	[SEAL.]	ROBERT B. TENNY.	[SEAL.]
CONRAD BECKER	[SEAL.]	R. W. HENDERSON.	[SEAL.]
MONTGOMERY BLAIR.	[SEAL.]	GEORGE GIBSON.	[SEAL.]

Subscribed and sworn to before me this fourth day of March, 1898.

JOHN R. YOUNG, *Clerk.*

10 *Certificate of Inquisition.*

Filed July 19, 1900.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

In re "NEWPORT PLACE," in Square 69, in the City of Washington, District of Columbia.

An inquisition of damages, taken in the District of Columbia, on the 17th day of March, A. D. 1898, before Aulick Palmer, Esq., United States marshal for said District, on the oaths of Abram D. Hazen, Henry F. Blount, E. Southerd Parker, John C. Poor, Charles C. Bryan, Nicholas H. Shea, Montgomery Blair, John J. Hogan,

George Gibson, Robert B. Tenny, Conrad Becker and Richard W. Henderson, being a jury of 12 citizens who have no interest in the real estate mentioned in this proceeding, summoned and impanneled by said marshal on application in writing to him by the Commissioners of said District, to ascertain and appraise the damages which may accrue to the real estate of any person or persons by the opening of a minor street to be known as Newport place, through square number sixty-nine (69) in the city of Washington, in the District of Columbia, and the closing of alleys in said square as shown on triplicate plats of said square, showing said minor street to be opened, and alleys to be closed, prepared by the surveyor of said District, one of which plats was by him filed in the office of the Commissioners of the District of Columbia, one by him deposited with the recorder of deeds to be filed among the records of his office, and the remaining one kept in the office of said surveyor.

And the undersigned, the jurors aforesaid, having first taken and subscribed an oath in writing justly and impartially to discharge the duties imposed on them by the provisions of an act of Congress approved July 22nd entitled "An act to provide for the opening of alleys in the District of Columbia," and of an act amendatory thereof, approved August 24th, 1894, entitled "An act to open widen and extend alleys in the District of Columbia," and having entered upon said square, and viewed and examined the several lots of ground and improvements affected by the opening of said minor street and closing of said alleys, and having heard evidence introduced before us by parties interested, upon our oaths do say, we ascertain, appraise and value the damages which may accrue to the real estate of any person or persons by the opening of said minor street and the closing of said alleys, said several amounts of damages being the value of the respective parcels of land at the time
11 of the taking, viz:

Square.	Lot.	To whom assessed.	Feet taken.	Damages.
*	*	* * *	*	*
69	Sub-lot 43	Clarence A. Brandenburg...	300 sq. ft.	$75.00
69	Sub-lot 42	Do. ...	304.95 sq. ft.	92.00
*	*	* * *	*	*

And, we, the jurors aforesaid, hereby apportion the amount of said damages, so ascertained and appraised by us aforesaid, including $20 for the services of said marshal and $60 for the services of said jury, less the sum of $3298.13, agreed to be paid to the District as assessments against the property adjoining alleys closed, marked B, C, D, E, & F, on the plat filed in this cause by the parties taking the same.

$3298.13

$22687.87

In witness whereof, we the jurors aforesaid, have hereunto set our respective hands and seals this 17th day of March, 1898, A. D.

A. D. HAZEN.	[SEAL.]	MONTGOMERY BLAIR.	[SEAL.]
HENRY F. BLOUNT.	[SEAL.]		
E. SOUTHERD PARKER.	[SEAL.]	J. J. HOGAN.	[SEAL.]
		GEO. GIBSON.	[SEAL.]
JOHN C. POOR.	[SEAL.]	ROB'T B. TENNY.	[SEAL.]
CHARLES C. BRYAN.	[SEAL.]	C. BECKER.	[SEAL.]
N. H. SHEA.	[SEAL.]	R. W. HENDERSON.	[SEAL.]

WASHINGTON, D. C., *March 17th*, 1898.

I hereby certify to the foregoing inquisition and return the same to the Commissioners of the District of Columbia.

AULICK PALMER,
United States Marshal for the Dist. of Columbia.

Square.	Lot.	To whom assessed.	Amount of benefits.
* * *	*	* * *	*
69	Sub lot 6	Clarence A. Brandenburg...	$110.00
69	Sub lot 7	Do. ...	140.00
69	Sub-lot 42	Do. ...	650.00
69	Sub-lot 43	Do. ...	550.00
* * *	*	* * *	*

In witness whereof, we the jurors aforesaid, have hereunto set our respective hands and seals this 17th day of March 1898, A. D.

A. D. HAZEN.	[SEAL.]	MONTGOMERY BLAIR.	[SEAL.]
HENRY F. BLOUNT.	[SEAL.]		
E. SOUTHERD PARKER.	[SEAL.]	J. J. HOGAN.	[SEAL.]
		GEO. GIBSON.	[SEAL.]
JOHN C. POOR.	[SEAL.]	ROB'T B. TENNY.	[SEAL.]
CHARLES C. BRYAN.	[SEAL.]	C. BECKER.	[SEAL.]
N. H. SHEA.	[SEAL.]	R. W. HENDERSON.	[SEAL.]

12 WASHINGTON, D. C., *March 17th*, 1898.

I hereby certify to the foregoing inquisition and return the same to the Commissioners of the District of Columbia.

AULICK PALMER,
United States Marshal for the District of Columbia.

Assessment of Benefits.

Filed July 19, 1900.

Assessment of benefits apportioned by the jury of condemnation in the matter of the minor street called "Newport place," in square 69, in the city of Washington, District of Columbia, opened under act of Congress of July 22, 1892, as amended by act of Congress of August 24th, 1894.

Square.	Lot.	Name of owner.	Benefits.	Damages awarded by jury to be deducted.	Amount due.
			Dolls. Cts.	*Dolls. Cts.*	*Dolls. Cts.*
*	*	* * *	*	*	*
69	Sub. 42	Clarence A. Brandenburg....	650.00	92.00	558.00
69	Sub. 43	Clarence A. Brandenburg....	550.00	75.00	475.00
*	*	* * *	*	*	*
			$22687.87	$25906.00	$20593.87

February 23rd. 1899.
(Signed)

E. G. DAVIS,
Collector of Taxes, District of Columbia.

Motion to Quash Return.

Filed February 24, 1905.

In the Supreme Court of the District of Columbia.

No. 42961. Law.

CLARENCE A. BRANDENBURG
vs.
THE DISTRICT OF COLUMBIA.

Now comes the petitioner, by his attorneys, and moves the court to quash the return of the respondent filed herein, and for judgment quashing the taxes complained of in the petition notwithstanding such return.

C. A. BRANDENBURG,
Attorneys for Petitioner.

13 Supreme Court of the District of Columbia.

FRIDAY, *May* 19, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 42961.

CLARENCE A. BRANDENBURG, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

Upon hearing the petition, the writ of certiorari, and the return of the defendant thereto, and the motion of the petitioner to quash the return of the defendant and for judgment quashing the taxes complained of, it is considered that said motion be, and the same hereby is, overruled and judgment dismissing the petition ordered: Therefore it is considered that the writ of certiorari be, and hereby is quashed and for nothing held, and that the petition be, and hereby is dismissed at the costs of the petitioner.

The petitioner notes an appeal to the Court of Appeals, and the bond of costs is hereby fixed at $100.00.

Memorandum.

May 31, 1905.—Appeal bond filed.

Designation of Record.

Filed June 9, 1905.

In the Supreme Court of the District of Columbia.

No. 42961. Law.

CLARENCE A. BRANDENBURG
vs.
DISTRICT OF COLUMBIA.

To the clerk of said court:

We hereby designate the following portions of the record herein to be included in the transcript on appeal, in accordance with rule V, paragraph 1, section *g:*

1. The amended petition for writ of certiorari.
2. The return of respondent.
3. The following portions of the return in McClellan *vs.* District of Columbia, No. 43,944, made part of return herein.

(*a.*) Petition of property owners dated Dec. 23, 1897, omitting all

signatures except those of E. B. Jones, B. B. Moss, J. M. Johnson, trustee, W. L. Bramhall, trustee and R. L. Britton, trustee.

(*b.*) Certificate of assessor attached to said petition.

(*c.*) Certificate of marshal to Commissioners dated Feb. 16, 1898.

(*d.*) Order of Commissioners dated Feb. 1, 1898.

14 (*e.*) Return of service by marshal, omitting all names except "Clarence A. Brandenburg."

(*f.*) Oath of jurors.

(*g.*) Certificate of inquisition, omitting all items in the schedules attached thereto, except the headings, the assessments against Clarence A. Brandenburg, the certificate of the jurors.

(*h.*) The assessment by the assessor, omitting all except the caption, the assessment against Clarence A. Brandenburg, and the signature of the assessor.

4. Motion to quash return.

5. Judgment quashing writ.

BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

To the attorneys of the District of Columbia.

GENTLEMEN: In accordance with the rules of court, we hand you herewith a copy of the designation of the parts of the record that we consider necessary to a proper hearing of this case on appeal.

Very respectfully,
BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

Service of copy acknowledged this 9th day of May, 1905.
A. B. DUVALL,
F. H. STEPHENS,
Att'y- for D. C.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42,961, at law, wherein Clarence A. Brandenburg is petitioner, and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 17th day of July, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme Court. No. 1586. Clarence A. Brandenburg, appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 18, 1905. Henry W. Hodges, clerk.

15 THURSDAY, *October 5th, A. D.* 1905.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

and

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

The argument in the above entitled causes was commenced by Mr. E. C. Brandenburg, attorney for the appellant-, and as continued by Mr. F. H. Stephens, attorney for the appellee, and was concluded by Mr. E. C. Brandenburg, attorney for the appellants.

16 No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
v.
THE DISTRICT OF COLUMBIA.

Opinion.

Mr. Justice DUELL delivered the opion of the Court:

This is an appeal from the judgment of the court below overruling the motion of petitioner to quash the return of the respondent to the writ of certiorari, issued herein, and dismissing the petition.

It appears that appellant, at the time of the proceedings complained of, was, and still is, the owner in fee of certain lots known as 42 and 43 in square 69, in the District of Columbia.

By an act of Congress, approved July 22, 1892, the District Commissioners were authorized to open and extend alleys, and by an amendatory act, approved August 24, 1894, its terms were extended to authorize the opening of minor streets. Pursuant to the provisions of said acts, the Commissioners of the District of Columbia, upon the request of the claimed owners of more than one-half of the land in the square, in February, 1898, applied in writing to the marshal of the District to summon a jury to condemn the land necessary for widening a thirty-foot alley in square 69 to a width of sixty feet, and to apportion the damages and assess the benefits thereof as provided for in said acts. The minor street so to be created to be known as Newport Place. The marshal summoned a jury of twelve disinterested citizens and notified the owners

of the property to be affected, among whom is, this appellant, who is named as having been served with a copy of the notice, which specified the time and place of the meeting of the jury.

The jury, having subscribed and sworn to the oath required, proceeded to discharge the duties imposed upon them and duly certified their proceedings, which, in turn, were certified by the marshal and returned to the District Commissioners. The award and finding of the jury, so far as relates to the appellant's lots, shows that they assessed the value of the land taken at 25 cents per foot, amounting to $92 for sublot 42 and $75 for sublot 43. The jury charged against the parts of the two lots remaining as benefits at the rate of 50 cents per foot, or a total of $650 and $550, respectively, and deducting the sums allowed for the parts taken, found the amounts due to be, respectively, $558 and $475. Pursuant to the findings of the jury, the District assessor leviel these amounts against the residue of the two lots.

The District of Columbia made a return to the writ of certiorari, and prayed that it be quashed and the petition denied. A hearing was had, which resulted, as stated, in a denial of appellant's motion to quash the appellee's return and for judgment quashing the taxes complained of, and dismissing the petition for the writ. This action of the court below is assigned as the error in the case. It is urged on behalf of appellant, 1st, that the act of Congress under which the proceedings were had is unconstitutional, and 2d, that the proceedings had were not in accordance with law.

17 1. It is urged that the act is unconstitutional, because it provides for taking private property for public use without just compensation and without due process of law; because it provides for the apportionment of the total amount of damages awarded for the lands condemned, with the expenses of the proceedings, among the lots in the square without regard to actual benefits; that it limits the area of assessment to the particular square without reference to benefits to adjacent squares, and without regard to the fact that actual benefits may not equal the total cost of the improvements; and, finally, that the law being general, no legislative consideration can be had in reference to the actual benefits of the area benefited in each particular proceeding taken.

It is conceded that in view of the decision of the Supreme Court in Davidson *v.* Wright, 181 U. S. 371, Congress has the right to direct that all the expenses of an improvement may be assessed upon the property benefited, and may define the territorial district considered to be benefited. We are not prepared to say that Congress, having such right, may not pass a general act for opening or widening minor streets and alleys located within a single block, and declare that the property benefited shall be held to be the property within the block, and that the cost of the improvement shall be borne by the owners of such located property. Upon such a subject we think legislative consideration can be had, and that Congress exercised it in framing and passing the act complained of. It appears to us to be quite different from the case where tracts of land are to be taken for parks or other purposes, or from the opening of streets

of considerable length, opening up a new section of a city. We must not lose sight of the fact that the Supreme Court of the United States has spoken in no uncertain tone of the powers, both of a political and municipal nature, of Congress over the District of Columbia. U. S. *v.* Lee, 106 U. S. 196. In condemning private property for public purposes hardships will often follow, be the proceedings had either under a general statute or under a special act. We may admit that special acts for the purpose specified are fairer to and better for the property owner than general acts, but to declare a genaral act unconstitutional requires something more. In our poinion, the act under which this proceeding was had is not unconstitutional.

2. This conclusion requires us to consider whether the alleged irregularities in the proceeding were such as to require a ruling that the tax complained of should be annulled. Any objection based on the ground that the Commissioners of the District failed to certify that the preservation of peace, good order, and public morals required the widening of the alley, conceding that the passageway widened was an alley and not a minor street, is of no force, provided the owners of more than one-half of the real estate in the square signed the petition upon which they acted. It appears that the District assessor certified that the persons whose signatures were appended to the petition appeared to be the owners of 121,255 square feet, which was more than the one-half of the land within the square. If the contention of the appellant that the certificate is faulty in that it states that the persons signing "appear to be the owners, etc., it would require, in order to make a certificate free from any criticism as to form, that an examination be made in all cases similar to this, as well as in this, not contemplated by the act in question or by any reasonable act. The objection is one which should be taken, if at any time, when the hearing is had before the jury. It appears that notice was given to the appellant of the time and place of the meeting, and, although the notice is objected as insufficient, we think that it was sufficient to require the presence of the appellant, if he desired to raise objections to the preliminary proceedings or to see that the damages and advantages to his property were properly passed upon. This is so at least as to technical objections, which could then have been cured. We think that the certificate of the assessor was sufficient both as to form and substance, and that the signatures to the petition were sufficient basis upon which to found his certificate. It is not to be presumed that he did not make proper examination of the official records in considering the petition, nor that he did not have sufficient proof before him that the parties signing had the legal title to the property for which they signed. While it may be that the appellant could have shown otherwise, and is injured because he did not do so at a proper time, we must consider that the tax payers of the District are entitled to have their interests guarded. While it is stated in appellant's brief that this proceeding was promptly taken, yet the record discloses nothing earlier in date than the filing of the amended petition, which was on June

3, 1904. Proceedings such as these should not only be promptly commenced but diligently prosecuted. Nevertheless, we do not question that all statutory requirements in proceedings of this nature must be observed, and that any failure to observe them can be availed of at almost any stage of the proceeding, but we have referred to what might be termed the equities and hardships of the case at bar because the appellant's argument, or brief, largely relates to them.

The objections that there is no finding by the jury of benefits, and that the assessment is in excess of the value of the lots and in excess of the benefits received, are not sufficiently shown to warrant a reversal. The jury having found the damages to the real estate to be the value of the respective parcels of land at the time of taking, proceeded, as the act required them to do, to apportion the amount of such damages as benefits to the remaining property—all this after having "entered upon said square" and after "having heard evidence introduced by the parties interested." The appellant having been served with due notice, had an opportunity to be heard on the subject of damages and benefits to his lots, and can not now be heard to insist that the taxes complained of should be annulled because the jury failed to make correct assessment and apportionment, whatever his rights may be to attack the constitutionality of the act and the preliminary steps leading up to such proceedings before the jury.

While on its face the allegations of the amended petition, especially as fortified by the brief, show a case of hardship, it is not such a one as we can recognize as vitiating the act under which the proceedings were taken or invalidating the proceeding itself.

We concluded that there was no error in the judgment of the court below, and it should be affirmed, with costs. And it is so ordered.

18 WEDNESDAY, *November 8th, A. D.* 1905.

No. 1586. October Term 1905.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE DUELL.

November 8, 1905.

19 In the Court of Appeals of the District of Columbia.

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Comes now the above named appellant, petitioner in the court below, by his attorneys, and complains that in the record and proceedings in said cause, and also in the judgment of the Supreme Court of the District of Columbia dismissing the petition of said appellant, and in the judgment of said Court of Appeals of the District of Columbia affirming the judgment of said Supreme Court of the District of Columbia, manifest error hath happened to the great damage of said appellant.

Wherefore, said appellant, prays for the allowance of a writ of error, for the reasons specified in the assignment of errors herewith filed, and for an order fixing the amount of bond for costs in said cause, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated at Washington, D. C., November 16, 1905.

CLARENCE A. BRANDENBURG,
Appellant and Petitioner,
By BRANDENBURG & BRANDENBURG,
His Attorneys.

20 In the Court of Appeals of the District of Columbia.

No. 1586. October Term 1905.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Assignment of Errors.

Comes now the appellant, Clarence A. Brandenburg, by his attorneys, and files the following assignment of errors upon which he will rely in the prosecution of the writ of error in the above entitled cause.

1. That the Supreme Court of the District of Columbia erred in dismissing the petition of the petitioner, appellant herein and rendering judgment against said petitioner.

2. That said court erred in finding and holding that the Act of Congress, pursuant to which the proceedings in these proceedings were had, is Constitutional and valid.

3. That said Court erred in finding and holding that the proceedings for the condemnation of the land and the assessment of benefits in these proceedings mentioned, were in accordance with law and valid.

4. That the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia.

5. That said Court of Appeals erred in finding and holding that the Act of Congress pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment against the residue of his property was made, is Constitutional and valid.

6. That said Court of Appeals erred in finding and holding that the proceedings pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment for benefits against the residue of his land was made, were in accordance with law.

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Wherefore, the said Clarence A. Brandenburg, appellant herein, prays that the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, may be reversed and that the proceedings for the condemnation of the land of the petitioner and for the assessment of benefits in these proceedings mentioned, may be set aside and for naught held.

BRANDENBURG & BRANDENBURG,
Attorneys for Appellant.

(Endorsed:) No. 1586. In the Court of Appeals. Oct. Term 1905. Clarence A. Brandenburg *vs.* The District of Columbia. Petition for writ of error and Assignment of Errors. Court of Appeals, District of Columbia, Filed Jan. 4, 1906. Henry W. Hodges, Clerk.

22 THURSDAY, *January 4th, A. D.* 1906.

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

On motion of Mr. E. C. Brandenburg, of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Clarence A. Brandenburg, Appellant and The District of Columbia, a manifest error hath happened, to

the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of January, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

24 (*Bond on Writ of Error.*)

Know all Men by these Presents, That I, Clarence A. Brandenburg, as principal, and Gertrude E. Brandenburg, as surety, are held and firmly bound unto The District of Columbia in the full and just sum of Three Hundred dollars to be paid to the said The District of Columbia, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of December, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Clarence A. Brandenburg and The District of Columbia a judgment was rendered against the said Clarence A. Brandenburg and the said Clarence A. Brandenburg having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The District of Columbia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Clarence A. Brandenburg shall prosecute said writ of error to

effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CLARENCE A. BRANDENBURG. [SEAL.]
GERTRUDE E. BRANDENBURG. [SEAL.]

Sealed and delivered in the presence of—

JOS. GIEDLAETZS.
E. C. BRANDENBURG.

O. K.
E. H. T.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1586. Clarence A. Brandenburg, Appellant, *vs.* The District of Columbia. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 12, 1906. Henry W. Hodges, Clerk.

25 UNITED STATES OF AMERICA, *ss:*

To The District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Clarence A. Brandenburg is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of January, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Jan. 12, '06.

Service accepted.
F. H. STEPHENS,
Ass't Corp. Counsel.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 12, 1906. Henry W. Hodges, Clerk.

26 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbering from 1 to 25 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Clarence A. Brandenburg, Appellant, *vs.* The District of Columbia. No. 1586, January Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of January A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,067. District of Columbia Court of Appeals. Term No. 191. Clarence A. Brandenburg, plaintiff in error, *vs.* The District of Columbia. Filed January 26th, 1906. File No. 20,067.